SUPREME COURT U. S.

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JOHN P. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1263

JAPAN LINE, LTD., KAWASAKI KISEN KAISHA LTD., MITSUI O.S.K. LINES, LTD., NIPPON YUSEN KAISHA, LTD., YAMASHITA-SHINNIHON STEAMSHIP COMPANY, LTD., and MARITIME COMPANY OF THE PHILIPPINES,

Petitioners,

v.

SABRE SHIPPING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT SABRE SHIPPING CORPORATION IN OPPOSITION

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Of Counsel

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Question Presented

On the basis of petitioners' Statement of the Case and the opinions of the District Court and the Court of Appeals, reprinted as Appendices A and B to the instant petition, we believe it clear that the only question presented to this Court is:

Whether the Court of Appeals for the Second Circuit abused its discretion in refusing to entertain a petition for a common law writ of certiorari under the All Writs Act (28 U.S.C. §1651(a)) seeking interlocutory review of an order of the United States District Court for the Southern District of New York insofar as it denied petitioners' motion for a stay or dismissal of this action pending a reference to the Federal Maritime Commission.

Statement of the Case

While rejecting certain of the characterizations of respondent's actions contained in petitioners' Statement of the Case, we accept the factual statements therein as essentially correct for present purposes.

ARGUMENT

We submit that the Court of Appeals acted well within its discretion in refusing to entertain petitioners' request for an extraordinary writ insofar as that request was predicated on the need for "primary" resort to the Federal Maritime Commission, where it is undisputed that the factual issues at bar were previously the subject of Maritime Commission proceedings spanning some five years. We submit further that even if the petition to the Second Circuit raised the issue of whether rates set contrary to the standards of Section 18(b)(5) of the Shipping Act destroy antitrust immunity,* it cannot seriously be argued

* The petition to the Court of Appeals expressly raised only the following question:

"Did the District Court err in refusing to order a stay of all further proceedings herein until the Federal Maritime

that the Court of Appeals abused its discretion in determining that resolution of this issue, a matter of statutory interpretation, was within the competence of the District Court and not a proper subject for extraordinary interlocutory appellate review. Although if the courts later reject the position taken by the District Court either on the need for prior resort to the Federal Maritime Commission or on the antitrust consequences of a violation of Section 18(b)(5) of the Shipping Act, it may be that much judicial time and effort will have been wasted in the interim, we believe it clear that the Court of Appeals correctly determined that interlocutory review was not justified. Accordingly, the petition to this Court for a writ of certiorari is ill-founded and should be denied.

Commission should make a determination that defendants acted outside the scope of the agreements filed with and approved by the Federal Maritime Commission pursuant to Section 15 of the Shipping Act, 1916, as amended?" Petition for Writ of Certiorari to the United States District Court, Southern District of New York, p. 8.

Although respondent believes that the Section 18(b)(5) issue was encompassed by petitioner's argument in the Court of Appeals, it was thus not explicitly presented as an issue for determination by that Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 9, 1969